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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments to Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Procedures for Video Dialtone Service	)	RM-8221

COMMENTS OF
THE NEW ENGLAND CABLE TELEVISION ASSOCIATION
ON
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

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The New England Cable Television Association ("NECTA") hereby submits its comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

Nondiscriminatory access to the basic video dialtone platform is a critical means of preventing anticompetitive conduct by telephone companies. The principles outlined in the Reconsideration Order, such as rejection of anchor programming and the prohibition on any form of telephone company decision-making on how video programming is presented for sale to

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[1] See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, (released Nov. 7, 1994) ("Reconsideration Order").

consumers, are fully consistent with the FCC's unwavering emphasis on core principles of common carriage in the video dialtone context.[2] It is also consistent with the D.C. Circuit's recently expressed view of video dialtone as a purely common carrier service.[3]

A telephone company proposing to offer video dialtone service must establish a basic common carrier platform containing sufficient capacity to serve multiple video programmers and provide nondiscriminatory access to that platform.[4] The Commission stressed in its original Video Dialtone Order that the telephone company's role is to be limited to providing "unfettered access for all program providers."[5] This is the allowable extent of legitimate telephone company involvement in the provision of video dialtone service. Telephone companies should not be permitted to involve themselves in the provision of video programming beyond the simple provision of nondiscriminatory access, as many have proposed, including NYNEX, in their channel sharing and preferential access schemes.

The Commission has expressly determined that "if video

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[2] Reconsideration Order at ¶¶ 35, 64, 98.

[3] NCTA v. FCC, 33 F.3d 66 (D.C. Cir. 1994).

[4] Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCCRcd 5781, 5787 (1992), pets. for review pending sub nom. Mankato Citizens Telephone Co. v. FCC, No. 92-1404 et. al. (D.C. Cir. Sept. 9, 1992) ("Video Dialtone Order".

[5] Id. at 5805.

dialtone is to provide the maximum public interest benefits, we must ensure that video dialtone does not give any provider of competitive services an unfair advantage over its competitors."[6] The Commission's goal of equality of access, however, will be rendered meaningless by many proposals contained in the LECs' video dialtone applications, including those of NYNEX discussed below.

In light of the LECs' history of repeated abuse of their control over utility poles and conduits, the Commission has appropriately acknowledged the need to prevent LECs from exercising their control over pole and conduit space to discriminate against cable operators. With the institution of video dialtone, and thus the creation of direct competition between LECs and cable operators, the need for FCC rules restricting the opportunities for anticompetitive behavior by LECs is evident. Indeed, the Pole Attachment Act of 1978 was enacted as a response to anticompetitive behavior by LECs in leveraging their control over pole and conduit space against cable operators as potential future competitors in telephony. The recent resurgence of such unlawful behavior by LECs now that they are seeking to enter the video market underscores once again the need for even more effective regulatory safeguards.

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[6] Id.

II. THE LECS' PROPOSALS FOR CHANNEL SHARING ARRANGEMENTS, SUCH AS THOSE OF NYNEX, CONTRAVENE THE BASIC FCC MANDATE AS TO THE COMMON CARRIER CHARACTERISTICS OF VIDEO DIALTONE

The Commission's tentative conclusion that channel sharing arrangements can offer significant benefits to the public may be true, but only, as the Commission admits, "if properly structured."[7] As in many areas of life and regulation, the devil is in the details. The Commission acknowledged that "depending upon how they are structured, these arrangements can raise significant legal and policy issues."[8] In order to "enable multiple video programmers to offer full services package to consumers,"[9] the role of LECs such as NYNEX and The Southern New England Telephone Company should be expressly limited to the provision of access to their video dialtone networks.

While management of the shared channels may vary among the LEC proposals, the common theme throughout these proposals is involvement of LECs in the "facilitating," "managing," or "administering" of the shared channel arrangements. Such direct LEC involvement in channel sharing arrangements would violate the fundamental common carrier principles of the Video Dialtone Order.

The Commission has expressly prohibited telephone companies from "determining how video programming is presented for sale to

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7 Reconsideration Order at ¶ 274.

8 Id.

9 Id.

consumers, including making decisions concerning bundling, tiering, or the price, terms, and conditions of video programming offered to consumers."[10] NYNEX's proposed video dialtone broadcast channel administrator for example, is fundamentally at odds with this principle, and the Commission's basic common carriage policy for video dialtone. The extent of the control that NYNEX proposes to hold over the administrator casts serious doubt over the administrator's true independence.

While NYNEX may claim that it does not participate in the selection of video programming and its retailing to subscribers, NYNEX restricts the availability of the favored limited analog channels to over-the-air broadcasters,[11] sets procedures by which it will select an administrator, requires the administrator to make programming available for resale in a nondiscriminatory manner,[12] requires the administrator to pay tariff rates for the analog channels, establishes a gateway menu screen for every video information provider,[13] and imposes other terms governing the VIPs' relationship with their subscribers.[14] These "suggested guidelines" for the administrator far exceed the

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[10] The Chesapeake and Potomac Telephone Company of Virginia, 8 FCC Rcd. 2313, 2315 (1993).

[11] Applications of NYNEX for Section 214 Authority under the Communications Act, File Nos. W-P-C 6982, 6983, Exhibit G, Illustrative Tariff at y-2 ("Illustrative Tariff").

[12] id.

[13] Id. at y-6.

[14] Id. at y-8 through y-12.

intended role of telephone companies in video dialtone.

This blanket allocation of analog capacity to broadcast channels is blatantly discriminatory, creating second-class citizens out of all existing and new cable programming services, such TNT, Discovery, Bravo, The Food Network, C-SPAN and regional sports and news channels in New England and elsewhere.

III. PREFERENTIAL TREATMENT FOR CERTAIN CLASSES OF VIDEO PROVIDERS IS CONSTITUTIONALLY SUSPECT AND IS WITHOUT LEGAL OR POLICY SUPPORT

A. Preferential Treatment For Commercial Broadcasters or For Certain Classes of Video Programmers Would Be Unconstitutional

NECTA submits that there is no constitutionally permissible basis for adopting discriminatory video dialtone access or rate regulations that favor broadcast programmers over other, non-broadcast programmers on the LECs video dialtone platforms. For this reason, the Commission should decline to incorporate such preferences, whether for priority access to analog channels, as in the NYNEX proposal, or for reduced tariff rates, into its video dialtone framework.

The video dialtone preferences under consideration in this proceeding are analogous to the must-carry requirements that were evaluated by the Supreme Court in Turner.[15] Like the must-carry provisions there, on a video dialtone network, preferences would create a special class of governmentally favored speakers -

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[15] Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445 (1994).

- broadcast programmers -- for preferential treatment at the expense of other video programmers. Thus, like the must-carry provisions there, any video dialtone preferences here would burden the speech of non-broadcast programmers by making it more difficult for them to compete for carriage on the LECs video dialtone platforms.

Video dialtone platforms are expected to have channel capacity equivalent to or greater than the capacity of most cable systems. The Commission has nonetheless recognized that such capacity will not be infinite, and that, at least in the short term, "it may not be feasible for LECs to meet all demand for capacity due to limits on the expandablity of analog capacity and the costs associated with using digital capacity."[16] Thus, competition for channel capacity among programmers will continue in the video dialtone world.

It is undisputed that video programmers engage in speech and are entitled to the protections afforded by the First Amendment.[17] In view of the deleterious effect video dialtone preferences would have on the free speech rights of non-broadcast programmers, Turner makes clear that video dialtone preferences that favor broadcast programmers over other video programmers would be subject to heightened First Amendment scrutiny. The proper standard by which to assess the constitutionality of discriminatory video dialtone preferences would be, at a minimum,

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[16] Reconsideration Order at ¶ 39.

[17] Turner, 114 S.Ct. at 2456.

the intermediate level of scrutiny applicable to non-broadcast content-neutral restrictions that impose incidental burdens on free speech.[18] To withstand such scrutiny, the Commission would have to establish that (a) video dialtone preferences further an important governmental interest that is unrelated to the suppression of free expression, and (b) they do not burden substantially more speech than is necessary to further that interest.[19] Under this analysis, video dialtone preferences which favor broadcast programmers over non-broadcast programmers would fail.

The Commission has articulated three public interest objectives in support of its video dialtone policies: "facilitating competition in the provision of video services; promoting efficient investment in the national telecommunications infrastructure; and fostering the availability to the American public of new and diverse sources of video programming."[20] While each of these goals may be important in the abstract, there is no evidence that any of them would be served by the implementation of discriminatory video dialtone access or rate policies that favor broadcasters over other video programmers.[21] Nor is there any proof that such preferences are, in fact, necessary to advance those interests, or that they

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18 See Turner, 114 S.Ct. at 2469.

19 Id.

20 Reconsideration Order at ¶ 3.

21 Turner, 114 S.Ct. at 2470.

would not burden substantially more speech than is necessary to advance those interests.[22] Accordingly, in the absence of such evidence, the Commission should reject the concept of discriminatory video dialtone preferences as violative of the First Amendment.

Although broadcasters or LECs may argue that, for the reasons stated by Congress in support of the must-carry provisions, discriminatory video dialtone preferences are necessary to preserve the continued viability of local, over-the-air broadcasting, that argument is entirely without merit. First, the Court in Turner rejected the Government's claim that the must-carry provisions should be sustained simply because they purport to advance Congress' stated objectives.[23] Turner establishes that discriminatory video dialtone preferences which favor broadcasters over other classes of video programmers will not withstand First Amendment scrutiny unless the Commission is able to prove that they do, in fact, promote the Commission's video dialtone objectives in a direct and material way, and without burdening substantially more speech than is necessary to achieve those interests. Any harm to broadcasters from being forced to seek access to video dialtone platforms on a non-

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[22] Id.

[23] Id. The Turner case was therefore remanded for further evidence on the questions of whether the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must carry, and whether the must carry rules are sufficiently tailored to avoid burdening more speech than is necessary to achieve the government's interests. Id.

preferential basis is, at this point, highly conjectural at best.

Even if the must-carry rules ultimately were found to be constitutional, they would provide no valid basis for adopting discriminatory preferences in the video dialtone context. "Congress granted must carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry."[24] The economic assumptions underlying this belief -- that cable operators have both the market power and a financial incentive to harm broadcast stations with whom they allegedly compete for advertising revenues -- are based upon industry specific considerations that are thoroughly inapplicable in the video dialtone environment.

Under the Commission's common carrier video dialtone construct, the LECs themselves and broadcast stations will not compete for local advertising revenues. Nor will the LECs have any ability under the Commission's common carrier framework to prevent broadcast programmers from gaining access to video dialtone platforms. Indeed, the Third Notice firmly reiterates the expandability requirement that telephone companies wishing to offer video dialtone service must expand capacity to meet multiple video programming needs,[25] and finds this to be a "critical factor in reducing the ability of LECs to discriminate

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[24] Id.

[25] Reconsideration Order at ¶¶ 30-36.

in their provision of video dialtone service."[26]

Thus, Congress' findings with regard to the need for must-carry provisions in the cable context provide no basis for implementing discriminatory video dialtone preferences in the common carrier video dialtone context. Such a preference would be fatally subject to constitutional challenge.

B. Neither The Commission Nor Congress Has Demonstrated The Intent to Favor Broadcasters To The Extent NYNEX and Other LECs Propose

Based on the notion that no one programmer or group of programmers should receive special treatment on the video dialtone system, the Commission has appropriately imposed equal access and nondiscrimination obligations on telephone companies to expand system capacity for programmers on an as-needed basis. Thus, telephone companies must offer sufficient capacity,[27] not just provide equal access to whatever capacity they choose to make available.

Because of its nondiscrimination objective, the Commission specifically refrained from requiring telephone companies to set aside capacity at free or reduced rates for any class of video service providers. Specifically, the Commission found that "it would be unwise at this time to incorporate into our nondiscrimination objective a policy which favors certain groups of speakers over others."[28] Since video dialtone has yet to be

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[26] Id. at ¶ 36.

[27] Video Dialtone Order, 7 FCC Rcd. at 5797.

[28] Id.

offered to the public, circumstances have not changed since the FCC last spoke on this issue to warrant creation of favored groups of speakers by the LECs.

The "will carry" proposals of several LECs violates one of the core objectives of the regulatory framework for video dialtone: no provider of services must be given an unfair advantage over its competitors.[29] Instead of offering analog broadcast channels on a first-come, first-serve basis, NYNEX proposes to permit broadcasters to obtain them on a set-aside basis. The digital channels however, are available on a first-come, first-serve basis.

NYNEX's proposal to limit the availability of up to 20 of its analog channels to only broadcast stations cannot be reconciled with the basic requirement that video dialtone be equally accessible to all programmers. It in fact proposes to afford preferential treatment to UHF and VHF channels and thereby thwart the ability of other video information programmers to compete effectively. Neither NYNEX, nor other LECs, have provided any justification for not distributing the analog channels in the same manner as the digital channels. While NYNEX claims that its analog channel service arrangement "reasonably implements public policy in a VDT context by ensuring subscribers' ability to receive local broadcast and public access

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[29] Id. at 5804-5805; see also Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd. 300, 314 (1991).

signals in the clear,"[30] this was never the role the Commission intended for telephone companies. NYNEX, as well as other LECs, should leave implementation of public policy goals to the customer-programmers and provide the "unfettered access" that the Commission requires of a video dialtone provider.

NYNEX's channel allocation configuration exceeds any reasonable definition of common carriage as articulated by the Commission in its video dialtone orders and as accepted by the D.C. Circuit. NYNEX's attempted analogy in its Section 214 filings to cable operators' retention of channel numbers for VHF channels simply reveals NYNEX's intention to compete with cable operators by structuring its video dialtone network as a cable system. NYNEX's VDT proposal is essentially an attempt to clone the manner in which cable operators select and package their programming.

If Congress had intended all multichannel video providers to be required to carry local broadcast channels, or to give them a preference, it would have done so. The issue has been very recently before Congress in the 1992 Cable Act. Congress did not choose to provide such a preference to broadcasters. With full awareness of competing technologies, including the FCC's Video Dialtone Order adopted only months before enactment of the 1992 Cable Act, Congress did not, in adopting that Act, impose such broadcast carriage requirements or rate or channel preferences on

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[30] Consolidated Opposition of NYNEX to Petitions to Deny, File Nos. W-P-C 6982, 6983, (filed September 22, 1994).

DBS, MMDS, or other video dialtone providers.

The Commission has also explicitly declined "to impose a federal video dialtone access charge or to require reduced access fees for certain programmers or to impose federal PEG access requirements upon local telephone companies."[31] The Commission found it more appropriate for nonprofit entities to obtain funding for video dialtone access from the Congress or state legislatures.

Offering certain channels on a set-aside basis and at preferential rates to any select group is the antithesis of nondiscriminatory access to the basic platform that is the bedrock principle of video dialtone.

IV. THE COMMISSION SHOULD ADOPT SPECIFIC RULES TO PREVENT ANTICOMPETITIVE BLOCKAGE OF CABLE'S POLE AND CONDUIT ACCESS BY TELEPHONE COMPANIES PROVIDING VIDEO DIALTONE SERVICE

NECTA fully endorses the Commission's proposal to prevent telephone companies from denying cable systems reasonable access to their pole or conduit space in order to prevent or reduce competition from cable operators. Telephone companies clearly have the incentive, and ability, to wield their control over poles and conduit to prevent facilities-based video programmers from competing with the LECs' own provision of video dialtone. The Commission should also take further protective measures to require that LECs demonstrate in their Section 214 video dialtone applications that pole attachment rights or conduit space is

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[31] Video Dialtone Order, 7 FCC Rcd. at 5805.

available to cable competitors at reasonable charges.

Cable operators, competitors with LECs, are at the mercy of the LECs due to the significant amount of control they have over the access to poles and conduit that are essential for cable operators to provide wire-based services. Cable operators have traditionally faced anticompetitive conduct by LECs over pole and conduit space. Concerns with respect to the provision of cable television service by local telephone companies and their affiliates have a long history. As early as 1968, the Commission emphasized that "by reason of its control over utility poles, or other local advantages resulting from its status as an existing common carrier in the community, the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition."[32]

In investigating these issues during the 1960's, the Commission gathered evidence revealing that established telephone companies in fact held varying ownership interests in cable television operators for whom they provided channel service. At the same time, the Commission received evidence that telephone companies discriminated in favor of their own CATV affiliates and

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[32] General Tel. Co. of California, 13 FCC 2d 448, 463 (1968), aff'd sub nom. General Tel. Co. of California v. FCC, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969). In part based on this concern about telco/cable affiliation, the Commission ruled that telephone companies must obtain certification from the FCC prior to constructing, acquiring or operating facilities to provide "channel service" (the lease of cable television transmission facilities) to cable television companies. 13 FCC2d at 463.

against independent cable operators with respect to access to pole space and tariffs for channel service, and had "otherwise improperly extended their existing monopoly in the telephone field to CATV services" in many communities.[33]

In response, the Commission initiated a rulemaking to address what policy might be adopted "to avoid undue concentration of control of CATV systems by telephone companies," to prevent "unfair or anticompetitive practices that might arise as a result of the affiliated relationship between telephone companies and CATV systems," to deal with "possible unfair competitive advantages that the affiliates of telephone companies may have over nonaffiliated entities in establishing CATV systems.[34]

The Commission concluded that telephone companies and their affiliates should be precluded from providing cable television service, but only within their local telephone service areas.[35] The Commission credited the position advanced by the Justice

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[33] Applications of Telephone Companies for Certain Certificates for Channel Facilities (Notice of Proposed Rule Making), 34 Fed. Reg. 6290, 6291 (1969).

[34] Id. at 6292.

[35] Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order), 21 FCC2d 307, 325 (1970) ("Report and Order"), recons. in part, 22 FCC2d 746 (1970), aff'd sub nom. General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). This ruling required telephone companies to divest themselves of cable television affiliates in those communities where telcos had in fact extended their telephone monopolies into the cable television business.

Department that the telephone monopoly into the areas of CATV and broadband coaxial cables, primarily to assure themselves of control over the services broadband coaxial cable will perform in the future.[36] The Commission found that it was the desire of telephone companies to promote the cable television business of their own cable television affiliates that gave rise to telco anticompetitive behavior against competing unaffiliated cable operators.

In a 1988 report, the NTIA noted that while the Pole Attachment Act, 47 U.S.C. § 224, "has reduced somewhat the need for the cross-ownership rules to protect against pole attachment abuses," it at the same time emphasized

> [T]here has been an extraordinary level of conflict, dispute, and litigation arising from the pole attachment issue. The scope of the problem is not limited to future construction, moreover, since manipulation of existing pole attachment arrangements can also be a source of dispute. Firms who would compete with local telephone companies(e.g., competitive cable companies or private fiber networks) might well still encounter problems in obtaining access or in maintenance, inspection, or other terms of agreement.[37]

This has been precisely the experience in New England in recent years as cable companies have begun to upgrade their networks with fiber optic cable. The institution of video dialtone, creating direct competition between cable operators and LECs, has resulted in a resurgence of LEC anticompetitive

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[36] Report and Order, 21 FCC2d at 324.

[37] NTIA, Video Program Distribution and Cable Television: Policy Issues and Recommendations 50 (1988).

behavior.

Local telephone companies like NYNEX essentially control the local communications pathways that cable operators must use through their ownership of poles and conduit space. These essential pole and conduit owners have frequently abused their monopoly power by leasing operators space only at excessive rates. NYNEX, has particularly abused its control over poles and conduit since the creation of video dialtone. Specifically, NYNEX currently requires all cable operators to agree to an amendment to its pole attachment contract that now requires cable operators to seek written permission from NYNEX before the operator overlashes fiber, since fiber could be used by cable to provide telephony in competition with NYNEX. Indeed, NYNEX has so staunchly resisted cable's overlashing with fiber that, in Portland, Maine, it sought the arrest of local cable crews for installing fiber optic lines on cable strand -- for which the operator held legitimate permits from NYNEX.

NYNEX has enforced similar overlash terms in several of its service areas. In Warwick, Rhode Island, for example, NYNEX demanded that Times Mirror refrain from overlashing fiber to poles, for which it also had permits, until the operator provided specific information to NYNEX concerning construction schedules and other information. This was a clear attempt by NYNEX to impede construction of new cable facilities as well as acquire information concerning the status of cable construction.

In Massachusetts, the Department of Public Utilities found

that New England Telephone set its cable conduit attachment rates at more than twice (and in some instances more that four times) the level that would result under a fully allocated cost methodology. NET was able to maintain its grossly excessive rates for cable conduit attachments for more than eight years (from 1984 to 1992).[38] The record in this case indicated that NET had taken the position that the terms of its contracts with conduit attachers were "non-negotiable", and the MDPU concluded that cable companies had "no choice but to sign the contracts as presented to them by NET."[39]

These are merely a few examples of the lengths that LECs will go in order to prevent or limit the amount of competition that can be provided by cable operators. NYNEX's use of its local control of telephone poles to monitor and interfere with cable operator deployment of fiber optic cable illustrates its concern with the competitive threat posed by cable operators. Conduct of this sort underscores the importance of establishing formal safeguards to restrict video dialtone service providers from unreasonably denying cable operators access to essential pole and conduit space.

Since video dialtone is expected to dramatically expand the role of LECs in the video marketplace and to facilitate

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[38] Complaint of Greater Media, Inc., D.P.U. 91-218 pp. 39-40 (1992). Where the cable company's attachment was in a vacant duct, NET effectively doubled the already inflated rate for conduit attachment by charging a full-duct rate even though the cable operator only required use of a half-duct.

[39] Greater Media, at 31-32.

competition between users of such facilities and incumbent cable operators, adoption of safeguards for pole and conduit access at fair rates to further these competitive goals would clearly serve the public interest.

CONCLUSION

For the above reasons, NECTA urges the Commission to curtail efforts by the telephone companies to tamper with the Commission's original video dialtone scheme through over-intrusive involvement in channel sharing and preferential access proposals. NECTA also urges the Commission to ensure that LECs provide pole attachments and conduit space at reasonable rates to cable operators.

Respectfully submitted,

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